OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 02-04 February 11, 2002

TO: All Regional Directors, Officers-in-Charge and Resident Officers

FROM: Arthur F. Rosenfeld, General Counsel

SUBJECT: Best Practice Compliance Case Report

I am very pleased to issue this report which codifies many of the best practices currently being used by some or all of our field offices in the processing of compliance cases. This report was compiled by a committee made up of field office and Washington division employees involved in the processing of compliance cases. They were charged with the task of uncovering and considering the practices used in the field offices to process compliance cases at all informal and formal stages and deciding whether to recommend them to every office. The diverse needs and resources of field offices across the country are reflected in the conclusions reached and the recommendations provided by the Committee.[1]

As you may recall, the Committee distributed a comprehensive survey tracking the processing of compliance cases in every field office. The surveys were completed by supervisory compliance officers, compliance officers and some Regional managers. The Committee reviewed and analyzed the responses to the surveys and from the data compiled prepared the attached report.

The report uses two terms, which are identical to the terms used in the Best Practices C Case Report, to identify those practices which the Committee agreed should be shared with the field. The first is the term **best practice**. That term designates those practices which should normally be adopted *in your Region* absent good cause or special operating needs. These are the practices which clearly effectuate the most efficient and effective case processing to achieve the General Counsel's stated goals. All **best practices** are bolded in the report.

The second term is **practice worthy of consideration**. This term designates a practice which the Committee believes warrants serious consideration and assessment as to whether it will enhance casehandling in your Region. The Committee recognized that there may be alternative acceptable practices already in place and therefore not all practices worthy of consideration will necessarily be implemented in each Region. All **practices worthy of consideration** also appear in bold.

I have attached one copy of this report. Please share the report with your managers and supervisors as well as the Local NLRB Union and your employee. You should consult and/or bargain, as appropriate, with your local union regarding those practices which the Region is considering. Thereafter, you should schedule a staff meeting to discuss those best practices which the Region will be adopting. The Division of Operations-Management will be consulting with the Regions to assess which best practices and practices worthy of consideration have been adopted.

The Committee also reviewed samples submitted by the Regions of various documents used in the processing of compliance cases, which should be useful to the Regions in processing their compliance cases. These samples will be placed on the Intranet Training Site, Regional Office Training, Compliance Section, for the convenience of the Regions.

The Remedies Committee is a standing committee which will continue its work on this and other matters and will continue to consider new best practices and practices worthy of consideration in the compliance area. In this regard, if you have an idea that you would like the committee to consider, please contact Louis Cimmino, Deputy to the Assistant General Counsel, Division of Operations-Management, phone number (913) 367-3003. My thanks to all of the Committee members for their hard work and a job well done.

/s/
A.F.R.

Attachment

cc: NLRBU

Release to the Public

MEMORANDUM GC 02-04

BEST PRACTICES COMPLIANCE CASE REPORT

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1. Collection of Remedial Information during the Initial Investigation

The Committee concluded that it is a practice worthy of consideration when gathering evidence during the initial investigation of a charge to obtain information from discriminatees that can be used to prepare backpay calculations. The Committee urges Regions to adopt a practice whereby Board agents interviewing potential discriminatees request that the witnesses provide their social security numbers so that we will be able to trace them in the event that they move without providing a forwarding address. Obtaining this information at the beginning of the process, when it is most easily available helps to ensure the success of collection efforts at a much later time. Further, agents should also attempt to ascertain the employer's Federal Employer ID either from the Employer or from an employee W-2 form issued by the Employer at the start of the investigation, so that it is available for collection or distribution efforts when compliance is initiated. In order to protect Social Security Numbers from improper disclosure, they should be recorded in a file memo, rather than an affidavit.

Several Regions have reported success with obtaining important information early in the investigation that can be used to compute backpay. Discriminatees' recollection of their wage rates, work schedules, hours of work and benefits are most accurate when recorded near in time to the actual discrimination. In addition, it is often possible to obtain copies of documentary material, in the form of work schedules, pay stubs, W-2 forms and other records when requested early in the investigation.

Collection of this material at the outset of the process will result in the expenditure of fewer resources at the traditional "compliance stage" and will provide for quicker more effective compliance. In situations where a respondent does not cooperate by providing records to allow the computation of gross backpay after a Board Order or Court Judgment, the region may be able to proceed to a compliance specification based upon the discriminatee's testimony and information contained in the file. In most cases a well-documented file contains sufficient information to allow the regional office to locate an employee who may have moved without leaving a forwarding address. However, in some cases where the region cannot locate the employee, it may be possible to rely upon file information to prepare gross backpay figures for a compliance specification. A sample checklist has been posted in the Compliance section of the Intranet Regional Office Training site.

2. Notice Posting Arrangements

A. The Committee concluded that when negotiating settlement agreements it is a best practice for Board agents to resolve notice posting and/or mailing issues and the need for foreign language notices as part of the settlement process. Agreements reached in this regard should preferably be set forth in the settlement agreement document, but at a minimum such agreements should be specifically confirmed by letter to the parties.

The number of notices required and location for posting are dependent on the nature and size of respondent's facility. When posting requirements are not resolved during the settlement process disputes that arise during the compliance stage of the case can be difficult and time consuming to resolve. Therefore, particularly in large or multi-location facilities, the Board agent should identify potential posting issues, raise them with the parties, and reach agreement prior to recommending approval of the settlement. Such agreements may include the specific number and locations for posting in a facility (e.g.,"cafeteria bulletin board," or "adjacent to each of the four time clocks," etc.), and identity of multi-location facilities by description and address (e.g., "each employee break room bulletin board at respondent's four retail stores located at...."). Likewise, where circumstances indicate the need for mailing notices, the mailing requirement should be identified and resolved as part of the settlement process. Such issues may include (1) the extent of the mailing (e.g., present employees, former employees working on particular dates, or job applicants), (2) who will bear the expense of duplicating and mailing the notices (typically respondent), and (3) the verification procedure to insure that notices were mailed in accordance with the agreement (typically a "Certification of Mailing" submitted by respondent confirming date of mailing and list of names and address to which the notices were mailed.)

B. The Committee concluded that in litigated unfair labor practice cases it is a best practice that Counsel for the General Counsel include arguments in the post hearing brief concerning posting, translation and mailing of notices as appropriate.

Traditionally such remedial issues have not been addressed in the initial litigation, but rather left to the compliance stage. When arguments for special remedial provisions are not made in the underlying litigation, such notice issues have proven difficult to resolve at the compliance stage of the case. Therefore, potential posting problems (such as multi-facility locations), need for foreign language notices, or requirement that respondent mail notices to present employees, former employees, or job applicants should be identified as early as possible in the litigation process and addressed in the brief.[2] In order to effectively argue for the remedies in post hearing briefs it may be necessary to adduce evidence at the hearing or obtain stipulations to relevant facts regarding such remedies.

3. Interest on Monetary Remedies in Informal Settlements

The Committee concluded that it is a practice worthy of consideration to regularly assess interest against monetary remedies obtained pursuant to the terms of informal settlement agreements.

Section 10555 of the Compliance Manual states that, "Interest is charged on net backpay and other monetary liabilities due in an unfair labor practice case. It is the compliance officer's responsibility to determine the interest amount due." On its face, this provision draws no distinction between formal and informal resolutions, and some Regions routinely include interest when they calculate the amount of a monetary remedy. Moreover, it is undeniable that to be made fully whole, the recipient of any monetary remedy must receive interest on money that he was temporarily denied, and that a respondent remained free to use, during the backpay period.

In circumstances when the monetary liability is small and/or accrued recently, interest may be of little matter. In other circumstances, a Region may conclude that factors such as the weakness of a case or lack of precision in the computations warrant either exclusion of interest, or trading it off in order to facilitate settlement. This discretion remains intact, but the Committee believes that as a matter of course, interest is a remedial component that merits consideration.

Those Regions that uniformly include interest in such computations reported that it is easily calculated and rarely becomes an issue. An agent-friendly interest table developed by an employee in Region 20 appears in the compliance section of the Intranet Regional Office Training site. This table is easily updated each calendar quarter, and for each quarter specifies the interest due at the end of each month, so that interest is easily adjusted to reflect the date upon which payment is requested.

Given the important role of interest in the make whole remedy, and the ease of including interest in the calculations presented to a respondent, the Committee strongly supports the proposition that it is sound practice to routinely consider assessing interest against monetary remedies, whatever the stage of the case.

4. Notification of Tax Liability on Interest Received and Right to Obtain Social Security Credit for Earnings

The Committee concluded it is a best practice that cover letters used to transmit backpay to discriminatees include language notifying the individuals (1) that interest on backpay is considered taxable income, and (2) that the individual should contact the Social Security Administration to receive proper credit for backpay for social security purposes.

Interest on backpay is considered taxable income by the IRS (CHM-Compliance, Sec. 10637.3). Although withholding for income taxes is applied to backpay, normally such withholdings are not applied to interest paid to discriminatees. (See CHM-Compliance, Sec. 10637.1.) Many discriminatees are unaware that interest is considered taxable income in the year received, and large interest payments could result in substantial tax consequences. Notification to discriminatees in the backpay transmittal letter that interest is considered taxable would allow discriminatees to adequately prepare for their tax obligations. The Committee is aware that the above-noted manual sections prohibit providing tax advice to discriminatees. However, merely advising that interest is taxable income does not constitute "tax advice." Discriminatees should be referred to the IRS regarding questions concerning tax matters.

Backpay is credited as earnings by Social Security in the year in which it is paid. In certain situations it may be advantageous to the discriminatees to have backpay allocated as Social Security earnings to the years of the backpay period. Since many discriminatees may be unaware of the impact of backpay on their Social Security earnings credits, in order to bring this issue to their attention language should be included in the backpay transmittal letter advising discriminatees to consult with Social Security regarding allocation of backpay to years in which it would have been earned. (See CHM-Compliance, Sec. 10637.4.)

A sample letter reflecting the above issues will be posted in the Compliance section of the Intranet Regional Office Training site.

5. Unnamed Discriminatees

The Committee concluded that it is a best practice to review complaints prior to or within a reasonable period of time after the issuance to establish whether or not unnamed discriminates may be entitled to a monetary remedy.

On June 26, 2000, the Office of the General Counsel issued Memorandum OM 00-45, "Compliance Best Practices--Early Computation of Backpay" which stressed, among other things, the need to notify discriminatees of their obligation to mitigate backpay and keep records regarding their interim employment and expenses. The memorandum further stated that in situations where alleged discriminatees have not yet been identified at the time complaint issues, immediate efforts should be undertaken to identify and locate such individuals. It appears from the compliance surveys that the regions are routinely making efforts to send backpay forms and other relevant material to discriminatees who have been named in complaints.

The Committee examined whether sufficient efforts are being made to establish contact with discriminatees who may not have participated in the underlying investigation or who may be unaware of remedies involving them. Specifically, the Committee reviewed the delay that frequently ensues following the issuance of a Board order which provides an affirmative make whole

remedy in 8(a)(5) cases or other cases where the complaint did not specifically allege the names of the discriminatees. This includes, for example, cases involving *Transmarine Navigation* remedies, unilateral changes, failure to execute a collective-bargaining agreement, withdrawal of recognition, relocation cases, or any other case in which the complaint seeks a monetary remedy but does not allege the names of the employees affected.

The agency is often thwarted in its efforts to seek compliance with such remedies by the time a Board order or court judgment issues. At that point, respondent's records, if available, usually contain outdated information on the whereabouts of these individuals if there has been employee turnover. In such instances, the Agency expends a considerable amount of money and effort attempting to locate missing discriminatees. In other instances, respondent may decline to cooperate with that portion of the order requiring that records identifying the affected employees be produced, or their records, for whatever reasons, may fail to provide the information needed by the Agency to effectuate compliance. In the worst-case scenario, a lengthy and time-consuming investigation is conducted to try to obtain sufficient information from alternative sources. In the end, the Region may not be able to obtain sufficient reliable information to identify all the discriminatees, much less to compute the monies owed in any reliable manner.

To avoid this situation, efforts should be made to establish the identity of all potential discriminatees at the earliest possible date. Once a *prima facie* case is established, the agent investigating the case may ask the charging party union for a copy of the collective-bargaining agreement involved, authorization cards, dues remittal lists received from the employer, or other documents which will reveal the identity of the employees affected by the unfair labor practices committed and assist in the computation of backpay. If the employer cooperates in the investigation, the agent can request payroll records or other documents, which will show the names, addresses, and social security numbers of the employees who will ultimately have to be made whole.

As stated in Memorandum OM 00-45, where necessary, Section 11 subpoenas may be utilized to obtain information necessary for the calculation of gross backpay and other monetary remedies. This would necessarily include information pertaining to the identity of the potential discriminatees involved in the unfair labor practices. Thus, where appropriate, the Region should consider including a request for the names, addresses, social security numbers, job titles, and other relevant information which will assist in the identification of affected employees in an investigative or issuance of a subpoena in order to facilitate settlement of the allegations or compliance with the remedy that will ultimately be ordered.

Once identified, the affected individuals should be notified that they might be entitled to a monetary remedy. Where applicable, they should be notified of their responsibilities similar to those of other discriminatees, and efforts should be made to maintain a record of their addresses, social security numbers, and other information relevant to the computation of backpay (e.g., questionnaires pertaining to the losses they have suffered).

6. Employee Benefit Plans - Reimbursement and Reinstatement

The Committee concluded that it is a practice worthy of consideration at the start of a compliance investigation involving reimbursement of health insurance and pension benefits, stock options or 401(k) plans, to solicit the assistance of the benefit administrator to compute the amount or nature of the benefits due.

In supplemental compliance proceedings the General Counsel has the burden of proving the benefits and reimbursements due to discriminatees under employee benefit plans. Normally, the restoration of pension benefits, stock options, 401(k) issues or health insurance benefits will depend upon the terms of the plan and the discriminatee's prior participation and enrollment. Much of this information can be obtained directly from the discriminatee, and the region's compliance officer is often able to compute the liability based upon employee testimony and plan documentation. However, when disputes arise over the extent and nature of a respondent's liability, the outcome of the matter will usually depend upon information received from the benefit administrator. Because benefit administrators are typically independent and responsible for establishing the policies and procedures under each contract, it is appropriate to consult with the administrator at the beginning of the process, when evaluating what is necessary under the make whole remedy.

Accordingly, to save Agency resources when computing benefits due pursuant to employee benefit plans such as pension, insurance, or reinvestment plans, the Committee recommends that the investigating agent solicit information about the plan and the name of the administrator early in the compliance process. Further, the region should make contact directly with the

administrator early in the process to ensure accurate interpretation of the plan's coverage. Prior to making its own separate determination of the liability, the region should request that the administrator compute the liability due under the circumstances, so that this information can be taken into account by the region in determining the amounts due under the order or judgment.

7. Consolidating Compliance Issues with Complaint

The Committee concluded that it is a practice worthy of consideration for the Regions to consolidate compliance issues with the underlying issues in the complaint whenever appropriate. Issues related to derivative liability such as alter ego and individual liability, or a finite backpay period are examples of circumstances that provide an opportunity to save time and resources by use of this tool.

In 1988, the Board revised Section 102.54 of its *Rules and Regulations* in order to provide for the consolidation of compliance matters with unfair labor practice proceedings. The related guidance initially given in Memorandum OM 88-105 was later restated in the *Compliance Manual* at Section 10620.3. In 1997, the Board again revised Section 102.54 of its *Rules and Regulations* to clarify the authority of Regional Directors to issue a compliance specification in advance of a Board order, on the basis of, but even without consolidation with, a related complaint and notice of hearing. That subject was addressed in Memorandum OM 97-16. More recently, Memorandum OM 98-12, entitled "Placing Greater Emphasis on Compliance Issues During Initial Stages of Case Processing," reviewed these authorities in the context of steps that Regions could take to maximize the likelihood that meaningful compliance results would be secured commensurate with the energy expended.

As acknowledged in Memorandum 98-12, the practices characterized as "frontloading" carry implications for resource allocation. It is undeniable, however, that the payoff on these investments can be valuable, either to forgo further activity when an absence of assets or some other circumstance will ultimately preclude a remedy, or to secure the assets necessary for the remedy before they are put out of reach.

It appears that most Regions are aware of the practices endorsed in Memorandum OM 98-12, and are pursuing them to some degree. The Committee concluded, however, that it should recommend that each Region review Memorandum OM 98-12, with an eye toward instituting, in a systematic fashion, the procedures set forth therein. In particular, it is a practice worthy of consideration to send every charging party, upon issuance of a complaint, a letter asking it to be vigilant for warning signs that might indicate problems, such as dissipation of assets or establishment of an alter ego, and to communicate any suspect activity immediately to the Region. However discovered, Regions should expeditiously investigate such matters even absent the filing of a new charge. Finally, it appears that Regions should be taking full advantage of their authority to litigate these and other issues at the earliest possible stage. For instance, Regions can consolidate a compliance specification with a complaint to establish the amount of liability, when the backpay period has tolled prior to hearing.

8. Statistical Sampling

The Committee determined that the use of statistical sampling techniques to calculate gross backpay and interim earnings is a practice worthy of consideration in appropriate cases.

Properly applied, statistical sampling is a scientifically accurate, widely accepted procedure to determine characteristics of a population by selecting and analyzing data from a small percentage of the population. One advantage of using statistical sampling rather than traditional gross and interim computations is to conserve agency resources and save time. A quicker more meaningful remedy may be available when using statistical sampling in complex cases. Cases involving a large number of employees, long backpay periods, or complex calculations are particularly appropriate for the consideration of a sampling formula.

Statistical sampling can be used (1) informally to determine backpay for settlement agreements and compliance with Board orders, or (2) formally as a basis for compliance specifications and supplemental litigation. For example, a random sampling of interim earnings of a relatively small number of unfair labor practice strikers could be a basis to estimate, for settlement purposes, the interim earnings of all the strikers. With agreement of the parties, such a formula would not necessarily require strict application of formal statistical principles or consultation with an outside expert. However, in cases where statistical sampling is used as a basis for a complex backpay formula in a Compliance Specification, and particularly where the parties have not agreed to use statistical sampling, it is highly recommended that the Region consult an outside expert early in the

process for assistance in constructing the statistical model, and to prepare for testimony by the expert in supplemental litigation. In order to obtain the benefit of the experience of other Regions with similar cases, you should discuss the use of a statistician with your Deputy or AGC. Additional assistance is available from the Contempt Litigation and Compliance Branch.

9. Utilization of ChoicePoint

The Committee concluded that it is a best practice to scrutinize respondent's status, name, and corporate form through ChoicePoint (or a comparable service provider) search within a reasonable period of time after issuance of complaint.

Preferably before issuing a complaint, or at a minimum sometime prior to trial of all Category 2 and 3 cases, Regional personnel should run a ChoicePoint (or comparable electronic data provider) search of respondent(s) and its (their) principals to ensure that the proper parties have been named, to determine respondent's corporate status, and to identify derivatively liable entities that should be brought into the case.

The Committee encourages broader use of ChoicePoint or other available data base services. In order to make full use of ChoicePoint, Regions are encouraged to review periodically their use of this service and ensure its broad use by their staffs. To improve access and ensure that all employees, and in particular new employees, are properly oriented in ChoicePoint and other data based research systems, training by the vendor and experienced Agency users should be provided at regular intervals.

10. Obtaining Security for Installment Settlements

The Committee concluded that it is a practice worthy of consideration for settlements involving installment payments to require security for the payments.

In order to ensure full payment of installment settlements, Regions should explore with respondents whether respondents have assets that can be used to secure payment of backpay in both formal and informal settlements. For example, Regions may want to secure settlements with promissory notes (executed by respondent or principals of respondent), deeds of trust against specific real estate, letters of credit, performance bonds, assignments of contract proceeds, or security agreements identifying particular assets.

11. Use of Default Language in Settlement Agreements

The Committee concluded that it is a best practice to include default language in informal settlement agreements when the region concludes that there is a substantial likelihood that the charged party/respondent will be unwilling or unable to fulfill its settlement obligations. The Committee further concluded that it is a best practice to obtain a formal settlement, or include default language or a security agreement as part of an informal settlement when the settlement involves large sums of money or installment payments.

The Committee concluded that default language should be included in informal settlement agreements to avoid the expense and delay which would result if a settlement agreement were set aside and the case is litigated. While the Committee recognizes that the use of default language will not prevent litigation regarding whether there has been non-compliance with the terms of the settlement or whether such non-compliance has been cured, the possibility of such litigation does not outweigh the above-noted benefits, which are likely to result from the use of such language. The Committee also noted the fact that the inclusion of such language in informal settlement agreements has been approved by both the Board and the Division of Advice. The Committee concluded, in agreement with the Division of Advice, that such language may not be needed in certain situations and should only be a necessary part of a settlement where the Region has reason to believe that the charged party/respondent may be unwilling or unable to fulfill its settlement obligations.

The Committee also concluded that default language might be useful as a tool in obtaining compliance with a Board order. While a formal settlement stipulation is also appropriate in such circumstances (see Appendix 9 of the Compliance Manual), a stipulation that includes default language may be a practical alternative, which would not result in the filing of a motion for summary judgment absent non-compliance by the respondent with the terms of the stipulation. A sample of such language, the Region 20 stipulation in the *Tomlinson Construction* case, appears in the compliance section of the Intranet Regional Office

Training site.

The Committee noted that in settlement situations involving installment payments Section 10603 of the Compliance Manual provides that Regions should normally insist on security provisions as a condition of accepting installment payments. The Committee also noted that if the settlement involves large sums of money or installment payments, Memorandum OM 95-29 states that it is preferable that a written formal settlement be obtained to facilitate collection. The Committee concluded that in situations involving large amounts of backpay or installment payments, that settlement agreements should include either default language, a security agreement as discussed in Section 10603 of the Compliance Manual and as discussed in the preceding section of this Report, or a formal settlement as discussed in Memorandum OM-95-29.

The Committee concluded that the following default language, which is similar to language that was approved by the Board in *SAE Young Westmont-Chicago, LLC,* 333 NLRB No. 59 (2001), should be utilized in appropriate circumstances in informal settlement agreements. While the *SAE* case involved a post-complaint settlement, the Committee concluded that such language should also be used in pre-complaint situations. In pre-complaint situations the allegations, which were found to have merit and would be the subject of a complaint should be specifically identified. The 14-day notice letter should specify the manner in which the charged party/respondent has failed to comply with the terms of the settlement and state the Region's intention to file a motion for summary judgment absent compliance with the terms of the settlement by no later than 14 days from the date of this letter. Similar language should be utilized in appropriate circumstances if the settlement relates to an outstanding Board order. Appropriate sample language is included in the above-noted Region 20 stipulation in the *Tomlinson Construction* case.

The Charged Party/Respondent agrees that in case of non-compliance with any of the terms of this Settlement Agreement by the Charged Party/Respondent, including but not limited to, failure to make timely installment payments of moneys as set forth above, and after 14 days notice from the Regional Director of the National Labor Relations Board of such non-compliance without remedy by the Charged Party/Respondent, the Regional Director may issue a complaint based upon the allegations of the charge(s) in the instant case(s) which were found to have merit, to wit; [ ], and/or reissue the complaint previously filed in the instant case(s). Thereafter, the General Counsel may file a motion for summary judgment with the Board on the allegations of the just issued complaint concerning the violations of the Act alleged therein. The Charged Party/Respondent understands and agrees that the allegations of the aforementioned complaint may be deemed to be true by the Board, that it will not contest the validity of any such allegations, and the Board may enter findings of fact, conclusions of law, and an order on the allegations of the aforementioned complaint. On receipt of said motion for summary judgment the Board shall issue an order requiring the Charged Party/Respondent to show cause why said Motion of the General Counsel should not be granted. The only issue that may be raised in response to the Board's Order to Show Cause is whether the Charged Party/Respondent defaulted upon the terms of this settlement agreement. The Board may then, without necessity of trial or any other proceeding, find all allegations of the complaint to be true and make findings of fact and conclusions of law consistent with those allegations adverse to the Charged Party/Respondent, on all issues raised by the pleadings. The Board may then issue an order providing a full remedy for the violations found as is customary to remedy such violations, including but not limited to the remedial provisions of this Settlement Agreement. The parties further agree that the Board's order may be entered thereon ex parte and that, upon application by the Board to the appropriate United States Court of Appeals for enforcement of the Board's order, judgment may be entered thereon ex parte and without opposition from the [Charged Party][Respondent].

12. Utilization of Section 10(e) Interim Relief

The Committee concluded that it is a best practice, when a Section 10(j) injunction expires as the result of the issuance of a Board order, to initiate action promptly to obtain a new injunction pursuant to Section 10(e), unless changed circumstances render such action unnecessary or inappropriate. Additionally, the Committee concluded that it is a best practice to consider the appropriateness of seeking Section 10(e) injunctive relief, pendente lite, with respect to cases pending or to be filed in the circuit courts, even if Section 10(j) relief was not earlier sought.

Regions should consider, in each case in which an application for enforcement is likely to be necessary to obtain compliance, whether an argument could be made that the strength of the case on the merits coupled with the remedial gains to be achieved by injunctive relief pending review warrant an application for 10(e) relief.

Where an enforcement action is pending or will be sought, or where a respondent has filed for review, questions regarding interim Section 10(e) relief should be directed to the Appellate Court Branch. Where the circuit has ruled and the Section 10(e)

action involves a potential or pending contempt action and/or the need for post-judgment asset protection, the matter should be immediately referred to the Contempt Litigation & Compliance Branch.

13. Bankruptcy Proceedings

A. The Committee concluded that when a Region receives notice that a charged party/respondent is in bankruptcy, it is a best practice to promptly initiate efforts to assess what actions should be taken to protect the Board's claim in the bankruptcy proceeding.

The Committee noted the fact that Memorandum OM 97-60 sets forth the general rule that the filing of a bankruptcy petition in a pending unfair labor practice case requires that a high priority be given to promptly determining the likelihood of obtaining meaningful relief through the bankruptcy proceeding. Memorandum OM 97-60 further notes that if there appears to be a reasonable possibility of obtaining compliance with bargaining order or reinstatement obligations or securing payment of a significant amount of backpay, the case should be classified as Category III at least until such time as the Region has taken all appropriate steps to protect the Board's interests. The Committee concluded that a prompt review of the pending bankruptcy proceeding is necessary in order to accomplish the goal of protecting the Board's interests in the bankruptcy proceeding. For example, the Region may need to expeditiously file a proof of claim because of the bar date for filing claims. (See Compliance Manual Sec. 10610.3.) The Committee also concluded that the Regions, in appropriate circumstances, should promptly consult with either the Contempt and Compliance Branch or the Special Litigation Branch regarding the undertaking of actions to protect the Board's interest in a bankruptcy proceeding. (See Memorandum GC 97-3.)

B. The Committee concluded that it is a best practice to establish systems within the Region to ensure that the Board's interests in a bankruptcy proceeding are protected. In accordance with the guidelines set forth in Memorandum OM 97-60, the Regions should establish systems to address the following objectives:

I. Monitoring situations where the Region has discovered a bankruptcy petition has been or will be filed;
II. Filing proofs of claim and other pleadings required to protect the Board's interest;
III. Actively participating in the bankruptcy case to optimize the Board's opportunity for recovery.

The Committee concluded that the opportunity for recovery on the Board's claim is significantly enhanced if the Region becomes and remains, where appropriate, an active player in the bankruptcy proceedings. In order to become an active player, it is necessary to monitor the bankruptcy case to determine what is happening in the case and how those developments may affect the Board's interests. Such monitoring can be accomplished by use of the Internet and Pacer as well as by documents received by the Region pursuant to notices and requests for documents that have been filed with the Court. (See Compliance Manual Sec. 10610.2.) The Regions should also timely file proofs of claim and other pleadings that are required to protect the Board's interests. (See Compliance Manual Sec. 10610, et seq.; Memoranda OM 97-37, OM 94-62, OM 94-61, OM 94-20, OM 91-64.) Additionally, the Regions should actively participate in bankruptcy cases until such time as the Region determines there is no likelihood of a recovery on the Board's claim. This participation should include participation in the first meeting of creditors and examination of the debtor or other entity under Section 2004 of the Bankruptcy Code.

C. The Committee concluded that it is a best practice for each Region to designate an individual(s) to serve as a bankruptcy coordinator(s) who is responsible to promptly review bankruptcy pleadings received by the Region.

The Committee concluded that it is essential that Regions review bankruptcy pleadings promptly upon receipt, and that a determination be made regarding what response, if any, should be filed by the Region. In this regard, it may be necessary for a Region to consult with the Contempt and Compliance Branch or with the Special Litigation Branch to determine what course of action the Region should pursue. (See GC 97-3.) Because many bankruptcy matters are time sensitive, it is imperative that such consultations occur promptly after receipt of a pleading in order that a timely response may be filed. In order to assure a prompt review of all bankruptcy pleadings received by a Region, such pleadings should be reviewed by a bankruptcy coordinator who will recommend and/or decide what course of action the Region should take in response to the pleading. Such a prompt review of pleadings will give the Region the best opportunity to effectively protect the Board's interests in the bankruptcy proceeding.

D. The Committee concluded that it is a best practice for Regions to file a proof of claim in situations where the claim may arguably duplicate a claim filed by another creditor.

The basis for a claim filed by the Board is to seek a remedy for a violation of the Act. Additionally, the Board is the only creditor that has the authority to file a claim based upon violations of the Act. See *Nathanson v. NLRB*, 344 U.S. 25 (1952). While the Committee recognizes the fact that there may be situations where there are duplicative claims (i.e., a Board claim based upon Section 8(a)(5) for failure to make fund contributions and a union claim for failure to make the same fund contributions in violation of a contract), by filing a proof of claim the Region retains some control over how the potential duplicative claims are resolved. The Committee therefore concluded that a proof of claim should normally be filed and maintained notwithstanding the fact that such claim may arguably duplicate a claim filed by another creditor.

14. Excel Training for Compliance Officers and Compliance Assistants

The Committee concluded that to the extent a Compliance Officer or Compliance Assistant has not received formal training in the use of spreadsheet software prior to appointment, it is a best practice to provide basic instruction in Excel to newly appointed Compliance Officers and Compliance Assistants immediately after their appointment.

Most Board agents who work on compliance cases have benefited from using spreadsheet software as a tool for the development of backpay computations.[3] Experience has shown that spreadsheets have helped regional office personnel prepare credible backpay and interest computations. The improved productivity that results from the use of such software is well known. Adjustments in computations can be accomplished in seconds rather than hours, and time that previously was devoted to the manual computation of backpay can be directed toward addressing substantive issues. Many Regions have accumulated a library of sample spreadsheets, templates or applications that are available for use by agents working on compliance cases, training new employees, and providing assistance to other Regions.

Although some of our employees already are familiar with spreadsheet programs, the significance of this software in compliance necessitates that newly appointed compliance staff should receive appropriate training to ensure the most efficient use of Agency technology as early in their tenure as possible. In many offices, both Compliance Officers and Compliance Assistants prepare backpay calculations, and the Committee strongly supports training for employees serving in both of these positions. In addition, the Committee believes that Excel training provided within the Region by experienced users to all professionals, but especially those who work on compliance cases, is a practice worthy of consideration. Further, the Committee would also support continued higher level Excel training for employees who have demonstrated mastery of the basic skills and investigate compliance cases.

15. Compliance Training

The Committee concluded that it is a best practice for Regions to conduct periodic training on compliance issues, including derivative liability, collection and bankruptcy issues.

There can be no doubt that periodic training in compliance-related subjects for the entire professional staff will enhance the Region's ability to achieve compliance effectively and efficiently. At a minimum, new employees need to become acquainted with compliance principles, and the entire professional staff ought to be briefed as to new developments in Board, collection and bankruptcy law. In addition to the training that each Region benefits from offering in-house, opportunities are available from outside sources. Employees should be encouraged to avail themselves of Article 7 and discretionary funds to acquire or better develop skills in Excel and Access, and in such fields as accounting. Regions should take advantage of training provided by the U.S. Bankruptcy Trustee where available.

16. Regional Office Training for Compliance Assistants

The Committee concluded that it is a best practice for the Regions to routinely include its compliance assistant in its periodic training for professional staff members, whenever such training deals with compliance-related topics.

With the recent upgrade, increasing complexity of compliance assignments and expansion of duties, compliance assistants will need enhanced exposure to this kind of training to perform at the optimal level.

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[1] **The Committee consisted of David Colangelo, Assistant General Counsel Division of Advice; Daniel Collopy, Deputy Assistant General Counsel Contempt Litigation and Compliance Branch; Timothy Peck, Supervisory Compliance Officer Region 20; Pamela Reinertsen, Supervisory Compliance Officer Region 2; Kenneth Shapiro, Deputy Assistant General Counsel Contempt Litigation and Compliance Branch; Gary Shinners; Assistant General Counsel Contempt Litigation and Compliance Branch; Richard Simon, Deputy Regional Attorney Region 25; Peter Winkler, Deputy Assistant General Counsel Appellate Court Branch; William Yarbrough, Supervisory Field Examiner Region 26; Shelley Korch, Deputy to the Assistant General Counsel Division of Operations-Management; and Louis Cimmino, Deputy to the Assistant General Counsel Division of Operations-Management.**

[2] **Board orders now typically contain a provision requiring that Respondent mail notices to former employees in the event the facility has closed during the pendency of the litigation. However, certain situations may warrant the Respondent mailing notices where the facility has not closed. See Technology Service Solutions, 334 NLRB No. 18 (May 24, 2001).**

[3] **At the time of this report, the Agency is using Excel software, however this recommendation is directed toward providing training in whatever spreadsheet software is currently in use.**